No. 83-992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1983

DETROIT HEALTH CORPORATION and
WILLIAM F. HUBNER,
Petitioners,

v.

DENISE BENCE, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer may avail itself of the affirmative defense, of a "factor other than sex" where it pays only its female employees, who cause and generate substantially more gross sales than its male employees, at a lesser wage rate for selling the exact same product as its male employees?

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OPINIONS BELOW, JURISDICTIONAL STATEMENT, STATUTES INVOLVED

The Respondents, DENISE BENCE, et al, respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Sixth Circuit's Opinion reported at 712 F2d 1024 (6th Cir 1983).

The Petitioners' reference to the Opinions Below, Jurisdictional Statement, and Statutes Involved are deemed sufficient by Respondents and will not be restated pursuant to Supreme Court Rule 40.

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rate for selling the exact same product as its male employees?

STATEMENT OF THE CASE

A. History Of The Case

The Respondents adopt the Petitioners' statement of the history of the case.

B. Material Facts On Review

The material facts necessary for review are cogently stated in Senior Circuit Judge Weick's majority Opinion and are reprinted herein.

> "Plaintiffs-Appellants ('employees') are former employees of Detroit Health Corporation ('employer'). At all relevant times employer operated a chain of health spas, each of which was divided into a men's division and a women's division which operated on alternate days. Men operated the men's division and women operated the women's division. Employer's managers and assistant managers were paid, except for a sixth month period in 1975, by commissions based on gross sales of memberships. Male managers were paid 7.5% of the individual spa's gross sales of memberships to men. Female managers were paid 5% of gross sales of memberships to women. Male assistant managers received 4.5% of gross sales to men. Female assistant managers received 3% of gross sales to women.
>
> Over the course of employer's life, the gross volume of membership sales to women was 50% higher than the gross volume of membership sales to men. There was no difference in the job description of male and female managers or assistant managers and they performed their jobs under similar working conditions. The total remuneration received by males and females was substantially equal although the females made more sales

than the males." *Bence* v *Detroit Health*, 712 F2d 1024 (6th Cir 1983) [footnote omitted]; Petitioners' Appendix 2a.

REASONS FOR DENYING THE WRIT

A. The Alleged Conflicts Between The Sixth Circuit, And Other Courts Of Appeal, 1964 Interpretive Opinion Of The Wage And Hour Division, And District EEOC Determination Are Illusory And Distinguishable.

1. Third And Ninth Circuits

The alleged conflicts between the Sixth Circuit's Opinion in the instant case and the Third Circuit in *Hodgson* v *Robert Hall Clothes, Inc*, 473 F2d 589 (3rd Cir), *cert denied*, 414 US 866 (1973) and the Ninth Circuit in *Kouba* v *Allstate Ins Co*, 691 F2d 873 (9th Cir 1982) are illusory because the Sixth Circuit was not required to choose between a limited or expansive interpretation of exception (iv) of the Equal Pay Act to decide this case. The Petitioner simply failed to prove that the sex of the employee (female) was not a factor in the commission differential. The Sixth Circuit determined that the segregating of male and female employees into the men's and women's departments "*plus* application of a lower commission rate *only* to those who sold memberships to women effectively locked female employees, and only female employees, into a inferior position regardless of their effort or productivity." Since the lower commission rate could apply only to women, we do not believe employer has proved that "sex provided no part of the basis for the wage differential." *Bence* v *Detroit Health Corp*, *supra*, [citation and footnote omitted]. Petitioners' Appendix 12a, 13a. Based on the above determination, the Sixth Circuit held "only that an employer may not avail itself of the affirmative defense under §206(d)(iv) where it compensates male and female employees solely for selling the exact same product, only female employees can be compensated at a lower commission rate, and the

differential is not justified by any difference in economic benefit to the employer". *Id*, Petitioners' Appendix 13a.

Even though it makes no judgment as to whether the *Kouba* and *Robert Hall* interpretation should apply, the Court reviewed the Petitioners' argument under *Robert Hall* and found that its "economic benefit" argument to be without merit as, unlike *Robert Hall*, in the instant case, there is no difference in the product sold by the male and female employees, and in fact, the women employees provide more profit than their male counterparts not less. *Bence* v *Detroit Health Corp, supra;* Petitioners' Appendix 12a.

2. Wage And Hour Opinion

The factual situation in the Wage And Hour Opinion found in the Petitioners' Appendix 48a-50a, is distinguishable factually, wrong in its interpretation, and is of questionable value.

First, the opinion letter points out that there is not enough information to determine whether the jobs described are "equal" pursuant to the Equal Pay Act. In the instant case, there is no question that the male and female employees perform the same job. Additionally, the differential in draw was not consistent with the employer's avowed purpose of equalized earnings. Similarly, in the instant case, Petitioners' claim of equal remuneration is suspect as revealed in this case when the 60/40 ratio of membership sales to women and men broke down and the commission differential was maintained. *Id.;* Petitioners' Appendix 13a, [footnote 4].

Second, the goal of equal total remuneration is unsupportable in this instance as the Equal Pay Act "commands an equal *rate* of pay for equal work". *Id;* Petitioners' Appendix 5a.

Third, the interpretive opinion letter issued in 1964 is of questionable value. "[I]t must be noted that as time passes

the difference due the regulations interpreting the Equal Pay Act will by necessity slacken, since these regulations, issued in 1965, have never been amended to reflect judicial constructions of the Act." *Hein* v *Oregon College of Education*, 718 F2d 912, 914 (9th Cir 1983).

3. District EEOC Determination

The Petitioner maintains that a district office letter of determination should be outcome determinative after a Trial on the merits. Such reasoning is clearly illusory and faulty. First, there were two reviews, one favoring the Petitioner and one favoring the Respondents. Second, as described by the District Court in its September 11, 1981 Opinion:

> "No witnesses were called relative to these determinations even alluded to by the attorneys for plaintiffs or defendants in closing arguments. There is nothing before the court relative to these determinations that would indicate the nature and scope of the investigation that was made, if any, and, accordingly, the court is able to attach little or no weight to any of the determinations made, some of which were supportive of plaintiffs' contentions and some of which were supportive of defendants' contentions." Petitioners' Appendix 42a.

B. There Are No Special Or Important Reasons Mandating Review

First, review of the Sixth Circuit's decision would affect only the litigants in this case. Senior Circuit Judge Weick's majority Opinion was a narrow one. He stated:

> "Today's holding is a narrow one. We do not hold that an employer may not under any circumstances segregate male and female employees into separate departments and pay them different rates of wages. Nor do we endorse or reject the broad reading of §206(d) (1) (iv) set forth in *Robert Hall* and *Kouba*. Those are questions for another day." *Bence* v *Detroit Health Corp*, Petitioners' Appendix 13a.

Second, the Petitioners' arguments were fully considered and correctly decided by the Sixth Circuit with the majority opinion written by a most respected Senior Circuit Judge, and reviewed again pursuant to the Petitioners' request for a rehearing and a rehearing *en banc*.

Third, the groundswell clamoring for review is not quite as resounding as the Petitioner asserts as not all of the cases the Petitioner cited concern precisely the analysis of the "factor other than sex". In *Goodrich* v *Int'l Brotherhood of Elec Workers*, 712 F2d 1448, 1493 (DC Cir 1983), the reversal was based on genuine issues of material facts concerning prima facie case considerations of unequal work rather than the "factor other than sex". The Fifth Circuit reversed the District Court in *Plemer* v *Parsons-Gilbane*, 713 F2d 1127, 1137 (5th Cir 1983), on an evidentiary ruling wherein the District Court excluded the plaintiffs' statistical evidence on rebuttal.

CONCLUSION

For these reasons, a Writ of Certiorari should not issue in the within case.

Respectfully submitted,

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